

**Leveraging the Commercial Marketplace**  
**An Integrated Product Team Approach to Customer Support**  
*Instructor Guide*

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## **Introduction**

### **The reason for this course (*TRANSPARENCY 1*)**

In recent years there have been many changes in the Federal Acquisition Regulation (FAR), particularly in the area of commercial acquisition. This has resulted in confusion of when to buy and how best to buy commercially.

This course will give you some background in the area of the Federal Acquisition Streamlining Act and the Clinger-Cohn Act. It will also present some scenarios involving commercial acquisition. These examples will illustrate lessons learned.

### **Motivating Statement (*TRANSPARENCY 2*)**

Whenever changes occur there are a lot of questions, perceptions, and misunderstandings about those changes. Whenever money is involved the stakes are raised considerably. Questions left unanswered, faulty perceptions, and innocent misunderstandings have the potential of becoming extremely expensive and legally sensitive.

This course may not answer all your questions because there are so many factors involved in commercial acquisition. This is not a pricing class and it cannot solve all the frustrations that you may feel on the job. It will however, give you some methods of accessing whether to buy commercially and give you a chance to learn from other people's dealings in the commercial acquisition area.

### **Course objectives (*TRANSPARENCY 3*)**

These are the course objectives:

- Given a set of decision-making guidelines and several typical acquisition scenarios, determine whether a particular item or items are appropriate for procuring commercially.
- Apply procurement guidelines and regulations to procure the items for situations where procurement of a commercial item is appropriate.
- Apply lessons learned from specific cases (e.g., Boeing, Allied Signal, Cummings, etc.) to situations that Integrated Process Teams (IPTs) are currently facing.

## Using the Commercial Marketplace

### Benefits of using the commercial marketplace (*TRANSPARENCY 4*)

The Government has been shifting towards better use of the commercial marketplace in procurement of items for many years. Some of the benefits of using the commercial marketplace whenever possible are

- avoiding the costs of developing duplicate government-unique items when acceptable commercial items are available
- less voluminous solicitations
- increased flexibility to negotiate mutually satisfactory terms and conditions
- shortening leadtimes, and
- taking advantage of commercial systems for functions such as
  - storage
  - distribution
  - quality assurance
  - warranties, and
  - installation, maintenance, and repair of items.

### Contract types

FAR Part 12.207 delineates under which contract types commercial items may be bought.

“Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts (see subpart 16.5) may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. **Use of any other contract type to acquire commercial items is prohibited.**”

**FAR and sites governing commercial acquisition**

Commercial acquisition mainly covered in the FAR in

- FAR Part 10—Market Research
- FAR Part 11—Describing Agency Needs
- FAR Part 12—Acquisition of Commercial Items. FAR 12 should be used in
  - FAR Part 13—Simplified Procedures
  - FAR Part 14—Seal Bidding
  - FAR Part 15—Negotiation
- FAR Part 52.212-1—Instructions to Offerors
- FAR Part 52.212-2—Evaluation, Commercial Items
- FAR Part 52.212-3—Offeror Certifications and Representations
- FAR Part 52.212-4—Contract Terms and Conditions
- FAR Part 52.212-5—Terms and Conditions

## History of Commercial Acquisition

### **1972—Commission of Government Procurement (*TRANSPARENCY 5*)**

The shifting of use of the commercial marketplace had its beginnings in 1972 when the Commission of Government Procurement recommended that federal agencies replace government-unique items with commercial items to avoid the high cost of developing and producing government-unique items. The commission advised that statutory changes were essential to promoting the government's acquisition of commercial items.

### **1978—DoD published Directive 5000.37, Acquisition and Distribution of Commercial Items (ADCOP)**

In 1978 DoD published Directive 5000.37, Acquisition and Distribution of Commercial Items (ADCOP). The ADCOP program encouraged contracting officers to acquire commercial supplies instead of items built to military specifications (MILSPECS). This program was incorporated into the Federal Acquisition Regulation (FAR) when the FAR was first issued in 1984. The program encouraged the use of commercial items but it didn't offer any incentives to buy them and was soon regarded simply as a policy statement.

### **1982—Office of Management and Budget (OMB)**

In 1982 the Office of Management and Budget (OMB) reported to Congress that the government's reliance on government-unique specifications for items that were commonly available in the commercial market inhibited the purchase of commercially available items and services. OMB proposed a uniform acquisition statute stating that all federal agencies would have to establish a preference for the procurement of commercial items.

Although Congress did not pass the legislation, President Reagan signed Executive Order 12352 (Federal Procurement Reforms, 17 March 1982). It stated that agency heads should establish criteria for promoting competition, including the elimination of unnecessary government specifications and the expansion of commercial items purchases.

### **1984—Competition in Contracting Act (CICA) (*TRANSPARENCY 6*)**

In 1984 the Competition in Contracting Act (CICA) was passed by Congress. It required federal agencies to "promote the use of commercial items whenever practicable." However, no special incentives or statutory waivers were offered.

### **1986—Packard Commission**

In 1986 the President's Blue Ribbon Commission on Defense Management, known as the Packard Commission. The Commission recommended a statutory preference for commercial items and advocated the removal of statutory and regulatory impediments to the acquisition of commercial items and the use of effective commercial-style procurement competition.

To implement the Packard Commission recommendations, Congress passed

- Public Law 99-500, Omnibus Continuing Appropriations Act for Fiscal year 1986
- Public Law 99-591, Correct Version of Public Law 99-500
- Public Law 99-661, National Defense Authorization Act for Fiscal Year 1987

The three public laws were known as the Preference of Nondevelopmental Items Act. It created a statutory preference for DoD's acquisition of nondevelopmental items and a preference for DoD's use of performance, rather than design specifications.

### **1990-1991—Section 824(b) of the National Defense Authorization Act for Fiscal Year 1990 and 1991**

In 1990 and 1991 Section 824(b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 directed DoD to use simplified contracts for the acquisition of commercial items.

This act stated that

- contracts were to contain only clauses that were required to implement law determined by the Secretary of Defense to be appropriate for commercial item acquisitions.
- the contracting officer's written determination that a clause was essential to protect the government's interest was required in order to include any other clause in a contract.
- limited clauses could flow down to subcontracts for commercial item to those required by law.

### **DFARS Rule 211**

A DFARS rule to implement the changes brought on by the National Defense Authorization Act for Fiscal Year 1990 and 1991. This rule identified that fifty-seven provisions and clauses should form the baseline of terms and conditions required for government solicitations and contracts for commercial items, excluding the requirements of government-unique procurement statutes. Another seventy-two contract clauses were added to implement government-unique procurement statutes and executive orders.

### **1993—Advisory Panel on Streamlining and Codifying Acquisition Laws (Section 800 Panel) (*TRANSPARENCY 7*)**

In 1993 the Advisory Panel on Streamlining and Codifying Acquisition Laws (the Section 800 Panel) was created by DoD by congressional direction by Section 800 of the FY 1991 Defense Authorization Act. The Panel concluded that

- DFARS Rule 211 was overly restrictive and provided no relief from statutory requirements, and
- there was a lack of a complete systematic statutory and regulatory structure for buying commercial items.

The Panel proposed a new definition of “commercial items” and recommended several procurement laws be waived for commercial item acquisition. The Panel’s report became the blueprint for the Federal Acquisition Streamlining Act (FASA) and the Federal Acquisition Reform Act (FARA) (Clinger-Cohen Act).



# **FASA**

## **Introduction**

The Federal Acquisition Streamlining Act (FASA) was passed by Congress in 1994 because of a variety of circumstances that include

- recommendations of the Section 800 panel
- government downsizing
- inability of the government to keep up with the pace of commercial technology
- increased recognition that the Government-unique industrial base and the commercial industrial base must be integrated.

## **FASA into the FAR**

A team was formed under the direction of the Office of Federal Procurement Policy (OFPP) Administrator and the Deputy Under Secretary of Defense for Acquisition Reform to incorporate FASA into the FAR. In September 1995, the Federal Acquisition Circular (FAC) 90-32 was published. This Circular implemented the new commercial rules into FAR Parts 10, 11, 12, and 52.

## **Title VIII of FASA**

The passage of FASA established some of the most far-reaching procurement reform initiatives in the last fifty years. Central to FASA is Title VIII. It mandates the acquisition and utilization of commercial items and acquiring those items in a manner that is similar to that used in the commercial market.

## **Main Points of FASA (*TRANSPARENCY 8 AND 9*)**

In addition to mandating a preference for the acquisition of commercial/nondevelopmental items, FASA also

- provides a single broad definition of “commercial item”
- requires market research be done before
  - developing new requirements documents, or
  - soliciting for items or services over \$100,000
- waives specified statutory requirements such as
  - Walsh-Healey Act
  - Contingent fees, and
  - minimum responsive time for offers
- waives specific certifications and clause requirements under the
  - Clean Air Act, and
  - Contract Work Hours and Safety Standards Act

Additionally, FASA exempts micro-purchases from the Buy American Act and the Small Business Reservation ( which replaced the former Small Business/Small Purchase set-aside).

### **Standard Commercial Practice**

FASA mandates that, to the maximum extent practicable, contracts for commercial items would include only those clauses that are required to implement provisions of law or executive order, or that are determined to be consistent with standard commercial practice.

“Standard commercial practice” is a rather broad statement since business practices vary greatly so the FAR implementation uses the term “customary” rather than “standard.”

### **Flowdown to subcontractor**

FASA mandates the flowdown of contract clauses was also required to be minimized to the maximum practicable extent. It gives the authority to exempt **subcontractors** for commercial items from statutory requirements. This includes laws that were in place even prior to the passage of FASA. (SEE FAR 12.403 and FAR 52.2120–5(d))

## **FARA (Clinger-Cohn Act)**

### **Introduction**

A little over a year after the passage of FASA, the Federal Acquisition Reform Act (FARA) also known as the Clinger-Cohn Act made more changes affecting commercial item acquisitions.

### **Main points of the FARA (*TRANSPARENCY 10 AND 11*)**

The FARA

- removes the contracting officer's discretion to request certified cost or pricing data without an exception. (Contracting officers can obtain "information other than cost or pricing data." Cost information can be requested, but the contracting officer cannot require that it be certified.).
- eliminates the Government's post-award audit rights for acquisitions of commercial items
- authorizes a three year test of special simplified procedures for acquisitions of certain commercial items over the simplified acquisition threshold but not greater than \$5 million dollars (SEE FAR SUBPART 13.5). The test authority only applies to acquisitions when the contracting officer reasonably expects, based on the nature of the items or services being acquired on market research, that quotes or offers will include only commercial items.
- authorizes additional waivers of statutes for commercially available off-the-shelf (COTS) items
- broadens the definition of commercial services to include "market price" in addition to "catalog price." Service providers do not always have catalogs, but many services are performed competitively in the commercial marketplace and can be priced on the basis of the market price.
- limits applicability of cost accounting standards. This is true for contracts and subcontracts that are firm-fixed-price or fixed-price with economic price adjustments, provided that the price adjustment is not based on actual costs incurred. (SEE FAR 12.214)

## **Commercial Item Definition**

### **Introduction (*TRANSPARENCY 12 AND 13*)**

The Federal Acquisition Regulation (FAR) Part 2.1 is where various terms are defined. We will discuss each part of the “commercial items” definition in order to clarify the intent of each section of the definition.

### **FAR 2.101—commercial items—customarily used for nongovernment purposes**

FAR 2.101 defines a “commercial item” as:

- (a) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that—
  - (1) Has been sold, leased, or licensed to the general public; or,
  - (2) Has been offered for sale, lease, or license to the general public;

**Possible indications that an item is commercial, customarily used by the general public, are**

- **commercial sales history**
- **listing in catalogs or brochures**
- **an established price**
- **distributors, and**
- **availability to the general public.**

**However, a new offering, with no sales history is also considered a commercial item, if it is offered for sale to the general public.**

**The commercial market is global; commercial items are not limited to the domestic commercial market.**

### **Examples of DoD bought commercial items**

Examples of commercial items that DoD buys include

- transport aircraft
- computers
- medicine, and
- fuel.

**FAR 2.101– commercial items–item evolved from another item**

FAR 2.101 continues to define a “commercial item” as:

- (b) Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation.

**Commercial items that evolve from advances in technology or performance include product updates, model changes, and product improvements.**

**For example, new versions of software fall into this category.**

**FAR 2.101– commercial items–modifications**

FAR 2.101 continues to define a “commercial item” as:

- (c) Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for—
  - (1) Modifications of a type customarily available in the commercial marketplace; or
  - (2) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor.

**Commercial items with standard commercial modifications are items that are similarly customized for commercial customers.**

**For example, car and airplane manufacturers offer a standard set of options and routinely customize products for their commercial customers.**

**FAR 2.101– commercial items–combination of items**

- (d) Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition that are of a type customarily combined and sold in combination to the general public.

**A commercial item can be the product of integrating commercial subsystems and components into a unique system.**

**For example, a computer system composed of commercial subsystems integrated into a system would be considered a commercial item. A piece of industrial plant equipment that combines commercial components into a unique item based on customer needs is another example.**

**FAR 2.101– commercial items–items procured for support of an item**

- (e) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (a), (b), (c), or (d) of this definition, and if the source of such services—

- (1) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and
- (2) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.

**Examples include item installation, maintenance, repair, training, and other services related to item support.**

**FAR 2.101– commercial items–services**

- (f) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed.

**Construction, research and development services, warehousing, garbage collection, and transportation of household goods are examples of services that meet the provisions of the statute.**

**FAR 2.101– commercial items–combination of items and services**

- (g) Any item, combination of items, or service referred to in paragraphs (a) through (f), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

**For example, a commercial item transferred to a defense contractor from its commercial division or subsidiary for incorporation as a component in a defense system is a commercial item.**

**FAR 2.101– commercial items–nondevelopmental items**

- (h) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local governments.

**Examples of nondevelopmental items are protective vests used by police departments and rescue equipment used by fire and rescue units. Items developed for state and local governments at private expense are considered commercial items.**

## **Nondevelopmental (NDI) Items**

### **Introduction**

We will discuss each part of the “nondevelopmental items (NDIs)” definition, found in FAR Subpart 2.1, in order to clarify the intent of each section of the definition.

### **FAR 2.101–nondevelopmental items–customarily used for nongovernment purposes**

- (a) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement.

**NDIs include defense products previously developed by U.S. military services or defense agencies of U.S. allies. For example, the mechanical dereefer used with the Army’s cargo parachutes was developed for and first used by the Canadian army. Many trucks developed by the Army are also used by the other military services.**

- (b) Any item described in paragraph (a) of this definition that requires only minor modification or modifications of a type customarily available in the commercial market-place in order to meet the requirements of the procuring department or agency.

**The Mobile Subscriber Equipment System , originally developed for the French army, was modified by the U.S. Army for use as its field communications system. The Army’s M-119 Howitzer was a modified version of the British Light Gun.**

- (c) Any item of supply being produced that does not meet the requirements of paragraph (a) or (b) solely because the item is not yet in use.

**Items fully developed and in production, but not yet sold and in use are considered nondevelopmental. This distinction is made in order to capture the latest product developments and new technology. It is not intended to include prototypes or experimental runs. This type of NDI presents greater risk than items that have a performance history.**



## **Integration**

### **What is integration?**

Integration is a category of NDI not explicitly addressed in the FAR but it is another viable way to use NDI. Integration is an item created by integrating non-NDI subsystems and components into a unique system is a nondevelopmental item.

In these cases some development may be involved to ensure that NDI components and subsystems function as an assembled item and in the manner intended.

### **The integration process**

The integration process also usually includes the development of software necessary for components and subsystems to work together. Any development required for integration should be managed through a developmental acquisition strategy.

## **Market Research**

### **Introduction (*TRANSPARENCY 14*)**

In FAR Part 2.101, Market Research is defined as “the collecting and analyzing of information about the market’s capabilities to satisfy agency needs.”

Market Research is a process used to

- identify “customary business practices”
- collect information about existing products and potential suppliers
- organize information so that various levels of product performance and quality can be compared
- maintain pertinent data on various vendors and products in order to access support capabilities
- analyze all the information available in order to procure the best value item
- present data so that decision-making strategies can be clearly illustrated

### **Necessity of market research (*TRANSPARENCY 15*)**

FAR Part 10 states that market research must be done before

- developing new requirements documents for an acquisition by that agency
- soliciting offers for acquisitions with an estimated value in excess of the Simplified Acquisition Threshold (SAT) (a three year test period puts this threshold as \$5 million dollars for commercial acquisitions)
- soliciting offers for acquisitions with an estimated value less than the SAT when adequate information is not available and the circumstances justify its cost

## Methods of market research

Market research can be conducted by reviewing the following sources

- **Thomas Register**—(website address <http://thomasregister.com:8000>)—an alphabetical listing of companies; address and phone numbers; product listing; description of products; and manufacturers of products
- **Vendor Files**—identify suppliers; distributors, subcontractors, representative of products, brochures, and past and present Government contracts
- **Mandatory and optional schedules**—list products and services, suppliers, prices, contract period, and ordering information
- **Trade journals**—address products, price information (i.e., trends in the immediate area, price escalations, etc.)
- **Consumer Price Index (CPI)**—published monthly by the Bureau of Labor Statistics. The CPI provides a guide to changes to “retail” prices. It is used as a price adjustment factor in some areas of procurement (leasing in particular) and a general gauge of inflation.
- **Product Price Index**—published by the Bureau of Labor Statistics (BLS). Tracks changes in prices which producers receive from the initial commercial purchasers of their products.
- **Specialized Publications**—publications that offer current market information regarding products and their suppliers (e.g., Federal Computer Week and Communications Week)
- **Other Sources**—Yellow Pages, Consumer Reports on-line, procurement directories, commodity indices, product brochures and promotional literature, catalogs published by manufacturers, distributors, and dealers.

### Websites for market research

Some websites on that could be used for market research are

Name	Website Address
Commercial Advocates Forum	<a href="http://www.acq.osd.mil/ar/cadv.htm">http://www.acq.osd.mil/ar/cadv.htm</a>
Internet Catalog	<a href="http://www.gnn.com/indel.html">http://www.gnn.com/indel.html</a>
Federal Information Exchange	<a href="http://fie.com/www.us_gov.htm">http://fie.com/www.us_gov.htm</a>
Acquisition Reform Net	<a href="http://www-far.npr.gov">http://www-far.npr.gov</a>
Thomas Register	<a href="http://www.thomasregister.com:8000">http://www.thomasregister.com:8000</a>
Department of Commerce	<a href="http://www.stat-use.gov">http://www.stat-use.gov</a>
Federal Supply Schedule	<a href="http://www.fss.gsa.gov">http://www.fss.gsa.gov</a>
Small Business Administration	<a href="http://www.sbaonline.sba.gov/">http://www.sbaonline.sba.gov/</a>
National Contract Management Association	<a href="http://www.ncmahq.org">http://www.ncmahq.org</a>
Dow Jones Business Information Services	<a href="http://bis.dowjones.com/">http://bis.dowjones.com/</a>
Knight-Rider Financial and Commodity Information	<a href="http://www.route-one.co.uk/route-one/ridder/">http://www.route-one.co.uk/route-one/ridder/</a>
Standard & Poor's Research Reports	<a href="http://www.reserchmag.com">http://www.reserchmag.com</a>
Stock, commodity, technical analysis	<a href="http://www.thergroup.net/invest/ichome.htm">http://www.thergroup.net/invest/ichome.htm</a>
Manufacturer's Information Network	<a href="http://mfginfo.com/home.htm">http://mfginfo.com/home.htm</a>
Computer Buying Guide	<a href="http://www.maven.businessweek.com/">http://www.maven.businessweek.com/</a>
National Association of Purchasing Managers	<a href="http://catalog.com/napmsv/pcat.htm">http://catalog.com/napmsv/pcat.htm</a>
National Yellow Pages	<a href="http://s14bigyellow.com/first-visit.html">http://s14bigyellow.com/first-visit.html</a>

### Goals of any market research team

The goals of any market research team should be to

- understand the customer's needs
- identify potential suppliers and create a list of viable commercial sources
- educate potential suppliers about the customer's needs
- learn the capabilities of potential suppliers to provide satisfactory commercial items
- document research results

## **Market research helps identify commercial products (*TRANSPARENCY 16*)**

Once market research is complete, you will have established which category the customer's item request falls under. Can the request be filled

- commercially—is item already sold commercially?
- commercially with some modification—is the item sold commercially and would just need some modification (e.g., different coding, different machining) in order to meet the customer's need?

Of course if neither of these categories apply, market research will show that there is no commercial equivalent. Before you begin the process of procuring noncommercial items, you should go back to your customer. You can offer what is available commercially or commercially with modification to the customer and see if the customer could modify some of his requirements so that you could buy commercially. The goal is to buy as many items commercially as possible.

## Determining Commerciality

### Introduction (*TRANSPARENCY 17*)

In order to determine if an item is a commercial item, you need to refer to the “commercial item” definition in FAR Part 2.1. The definition is rather broad in order to try to accommodate many circumstances.

The most important thing to remember is that the contracting officer and not the offeror makes the determination if an item is commercial or not.

### Discretion of the contracting agency

Several Comptroller General decisions have affirmed that the determination of whether a product is a commercial type item is largely within the discretion of the contracting agency and will not be disturbed unless it is shown to be unreasonable.

Of course in making this determination, the contracting officer is required to request and consider the advice of appropriate specialists to include specialists in

- audit
- law
- engineering
- transportation, and
- other fields as appropriate.

### Classifying items as “commercial”

Classifying an item as “commercial” has both pros and cons attached to it.

Pro: Identification of an item as “commercial” allows for the use of a streamlined approach to the acquisition process .

Con: Great care must be taken when determining whether an item meets the definition of “commercial” especially for sole source items. Even if the price on the instant buy is reasonable, it is highly likely that the contractor will raise prices significantly in the future. Great care must also be taken to ensure the item meets the Government’s need.

Point out that under the changing commercial environment, cost and pricing data can not always be provided by a commercial company in the same way it was provided in the past. Many commercial companies no longer keep two sets of books—one for Government contracts and one for commercial. We can not just go back to doing the way we did business in the past.

### **Just because it is in the catalog . . . (*Transparency 18*)**

Just because an item appears in a catalog does not mean that it is commercial especially if the commerciality of the item has not been verified.

To determine if the item meets the commercial definition, the contracting officer needs evidence that the item meets **BOTH** parts of FAR 2.101(a). It must

- be of a type customarily used for nongovernmental purposes, and
- have been sold, leased or licensed (or offered for sale, lease, or licensed) to the general public.

This means that in order to meet **BOTH** criteria, the **EXACT** item being acquired must have been sold or offered for sale. “Of a type” or “similar to” to an item that has been sold or offered for sale to the general public is not enough for the item to be considered.

### **Evolved items (*Transparency 19*)**

An item is a commercial item if

- it is customarily used for nongovernment purposes
- has evolved through technological or performance advances
- is available through the commercial marketplace, and
- satisfies the Government’s delivery requirements

This is to accommodate items that are frequently updated (e.g., software).

### **Modified items (*Transparency 20*)**

An item is also a commercial item if

- minor modifications are made of a type **not** customarily available in the commercial marketplace but made to meet Government requirements, and
- the modifications do not significantly
  - alter the nongovernmental function
  - alter the essential physical characteristics of the item, or
  - change the purpose of a process.

This is to address the Government-unique modifications (e.g., paint, color, special packaging, or ruggedization)

**Is the modification minor?**

The determination whether a modification is minor is intended to be made on a case by case basis. Dollar values and size percentage may be considered but are not conclusive evidence that a modification is minor. If the price goes up significantly, this probably indicates that the offeror or contractor is introducing more risk and that the modification is therefore not minor.

**Obtain appropriate documentation or literature**

To determine that an item is commercial based on one or more of the paragraphs of the “commercial item” definition, other than paragraph (a), “of a type customarily used for nongovernmental purpose,” the contracting officer must obtain appropriate documentation as necessary. This could include commercial product literature or a technical opinion as to the effect of the modification.

**So What? (*TRANSPARENCY 21*)**

So what if I determine an item is commercial or not? The decision will change the acquisition process, the way you go about making the buy. It will not change the fact that you are still looking for the best price and best value for your customer.



## **Pricing of Commercial Items**

### **Introduction (*TRANSPARENCY 22*)**

When items are commercially available, the information need for justification of price is slightly different than the information needed for justification of non-commercial items.

### **Contracting officer's role (*TRANSPARENCY 23*)**

A contracting officer may not require offerors to submit cost or pricing data if the acquisition is commercial. However a contracting officer may rely on market research and the advice of experts in such field contracting, finance, packaging, traffic management and contract pricing to assist in the justification of the price.

The contracting officer is responsible for obtaining all other data to the extent necessary to determine price reasonableness. If adequate price competition exists, this type of information is unnecessary.

### **Things to keep in mind (*TRANSPARENCY 24*)**

Here are some things to keep in mind when pricing commercial items:

- Commerciality can impact the original contract as well as modifications. If a modification is so significant as to alter the commerciality of an item then cost or pricing data may be needed.
- Price analysis must be completed for all Government procured items to ensure prices are fair and reasonable. A fair and reasonable price is defined by what a prudent person would pay in the conduct of competitive business.
- The fact that an item has been defined as a commercial item and is listed in a contractor's catalog does not preclude the necessity of a fair and reasonable price determination.

### **Examples of additional data (*TRANSPARENCY 25*)**

The following are some examples of data which may be requested from the offeror.

<b>Element</b>	<b>Data which may be requested of the offeror</b>
Catalog Prices	Identify relevant offeror commercial catalogues, date, and related discounts
Market Pricing	Describe the nature of the market & how the market affects the offered price
Other evidence of price charges	Provide evidence of prices charged other customers
Services normally provided	Describe the services provided to the firm buying at the offered prices

### **Challenges to pricing of commercial items (*TRANSPARENCY 26*)**

The following are some of the challenges to determining price reasonableness for commercial items which must be overcome:

- There usually are differences between buyers' and sellers' terms for commercial items. Industry may try to represent their seller terms for pricing as the industry standard.
- Services (e.g. packaging, shipping, availability) for commercial items may exceed the Government's need. It may be possible to negotiate a price reduction, if the vendor's cost could be reduced while still ensuring that the item meets the Government's need.
- Agencies must not automatically feel they must drop critical requirements because the same or similar item is commercially available. A higher price may be justified if the feature is essential to meet the customer's need.
- Specialists involved in the acquisition may be reluctant to challenge the commercial price because an item is defined as commercial. Securing an optimum pricing agreement may require challenging the market for the best terms.

### **Challenges to pricing of commercial items**

The following are some of the challenges to determining price reasonableness for commercial items which must be overcome:

- Alternatives may not have been sufficiently reviewed. Areas overlooked may include: cost benefit analysis of retail versus wholesale logistics, cost of re-engineering the item if the price is too high, analysis of spare parts pricing, pricing policies, and challenging the price especially if Government terms could be better since we developed the item originally.
- Catalog pricing may be restrictive based on quantity being pursued. Government requirements may exceed normal commercial demand. The buyer should negotiate a lower price for quantities greater than listed in the catalog.